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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 199

GABRIEL DIAZ, RAY BAKER, JOHN FANNON AND RONALD VINCENT PECCIA,
Petitioners and Appellants,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION BY APPELLANTS AND PETITIONERS FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, No. 20498 of the Criminal Docket of Said Court.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Gabriel Diaz, Ray Baker, John Fannon and Ronald Vincent Peccia, pray that this Court grant a rehearing of its order of October 12, 1965 denying the petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition for certiorari filed herein on May 1, 1965.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

In our original application for certiorari the sole grounds urged for issuance of the writ was the prejudicial effect of supposed use of an alias by the defendant Diaz. We now urge, as basis for a rehearing of the denial of the petition, a point which was merely mentioned, in passing, but in no sense presented or developed in said petition, namely, the failure of the Court to inform counsel, before they made their arguments to the jury, that the Court intended to direct an acquittal as to one defendant, Cohen.

This error was fully preserved below and made the subject of Assignment of Error No. Three in our brief to the Court of Appeals. (Appellants Original brief, p. 53 et sequo) This point has been unmentioned by the Court of Appeals in its per curiam opinion. It is, we submit, a point of sufficient national interest to warrant consideration by this Court, particularly as there appears to be no case squarely on this point at the Supreme Court level and only a few decisions at the appellate level which even approach the problem.

As noted at length in our statement of the case on petition for certiorari, this case involved a prosecution for interstate shipment of forged bonds. The bonds were so genuine in appearance that they were calculated to be acceptable to almost any purchaser, one batch thereof being accepted by a bank as security for a loan and others being accepted by experienced investors after having them checked by experts.

The principal defense, therefore, was that these de-

fendants, appellants and petitioners herein, or at least some of them, may well have been acting in good faith in their varied connections with these bonds, like many other citizens, named in the evidence or testifying in Court, but unindicted.

The first intimation that the Court felt inclined to accept the idea that any defendant had acted in good faith occurred *after all argument to the jury had been concluded.* This occurred when counsel for Diaz, Mr. Gill, objected to remarks made during argument to the jury by the prosecution, referring specifically to language used by the prosecution "that Cohen knew from the first trip here that these bonds were counterfeit." (R. 737). Whereupon, the Court, for the first time declared: (R. 737)

THE COURT:
I AM GOING TO DISMISS NO. 1 AGAINST MR. COHEN ANYWAY.

Thereafter counsel for Diaz, Mr. Gill, specifically objected to the direction of a verdict of acquittal as to Cohen on the first count and *moved for a mistrial.* (R. 768)

In *ROSS V. UNITED STATES,* 180 F. 2d. 160, Sixth Cir. 1950, the Court, in discussing the obligations of the trial judge under Rule 30 to inform counsel of disposition of requests prior to their arguments to the jury, stated: (Page 165, col. 2)

"The obvious object of the rule in point is to require the judge to inform the trial lawyers in a fair way what the charge is going to be, SO THAT THEY MAY

INTELLIGENTLY ARGUE THE CASE TO THE JURY. (Emphasis added.)

In *UNITED STATES V. CRESCENT-KELVAN CO.*, 164 F. 2d 582, Third Circuit, 1948, the Court emphasized the importance of following Rule 30 as to notifying counsel of the intended disposition of requests as to charges *prior to argument*, and the reversal of convictions here seems predicated equally upon failure to observe this requirement as upon the failure to separate the counts of the indictment as to each defendant.

In *STEINBERG V. UNITED STATES*, 162 F. 2d 120, Fifth Circuit, 1947, the point was presented that the trial judge did not inform counsel of his proposed disposition of special charges, but in holding the error harmless, this Court, with Judge Sibley as organ declared: (Page 125, col. 2)

"The substance of most of the requests indeed appear in the charge. Some ought not to have been given. No argument is made as to error in refusing any, though a general specification of error was made in taking the appeal. NONE OF THEM SEEMS TO US TO BE OF A SORT THAT WOULD HAVE AFFECTED THE ARGUMENT IF IT HAD BEEN KNOWN THAT IT WOULD NOT BE GIVEN." (Emphasis added)

In the case at bar, exactly the reverse is true. Here, clearly a main defense of all defendants was that the bonds were of so genuine in appearance and the terms upon which they were being offered were unsuspicious, that merely trying to work up a deal on the bonds could not be taken as a badge of fraud. THIS WAS

OBVIOUSLY THE BASIS UPON WHICH THE COURT ORDERED AN ACQUITTAL AS TO COHEN ON COUNT ONE.

We submit that, ordinary, common sense fair play demanded that if the Court was going to let Cohen out on the basis that merely handling a deal with the bonds was insufficient to render him guilty, then the other defendants, *particularly Diaz and Peccia, were entitled to make the same argument as to their lack of guilty knowledge, merely by reason of their having handled the bonds.* We say that this is true particularly of Diaz because, as noted above, he was "low man on the Totem pole" as regards the time order of becoming connected with these bonds. He came into the picture just before Cohen.

WHAT MORE IMPORTANT ISSUE COULD THERE BE, FOR PURPOSES OF ARGUMENT, THAN THAT THE COURT ITSELF, BY DIRECTING A VERDICT OF ACQUITTAL AS TO ONE DEFENDANT, *WAS ACCEPTING A STANDARD OF COMPARISON AS TO LACK OF GUILTY KNOWLEDGE?*

Such a development was of the first magnitude, far surpassing the importance of any slight technical definitions which the Court might or might not see fit to give the jury.

In WRIGHT V. UNITED STATES, 339 F. 2d. 578 (Ninth Circuit, 1964) the Court found no difficulty in holding that failure of the trial Judge to inform counsel for the defendant as to what disposal he would make of certain specially requested charges was highly prejudicial and reversed the conviction. Referring

to Rule 30 of the Federal Rules of Criminal Procedure, the Court, quoted earlier cases, all to the effect that the purpose of Rule 30 is to permit trial lawyers to "intelligently argue the case to the jury".

We respectfully submit that, in the instant case the failure to inform counsel of the Court's intention to order an acquittal as to one defendant until after all argument had been concluded, was much more prejudicial to these defendants than what was held reversible error in Wright, supra.

In conclusion, we urge most earnestly that this Court grant a rehearing of its order denying certiorari, in order that the above point, and others previously presented of national interest, may be considered.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, G. Wray Gill, Sr. do hereby certify that I am of counsel for all petitioners in the foregoing application for rehearing and that I am a member of the Bar of the Supreme Court of the United States. I further certify that copies of the foregoing petition for rehearing have been served upon the Solicitor General of the United States and upon the United States Attorney for the Southern District of Florida at their respective offices by mail, postage prepaid, by posting same on the ____ day of November, 1965.

G. Wray Gill, Sr.